

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 19, 2011

v

SALINA DESIREE FISHER,

Defendant-Appellant.

No. 295322
Iosco Circuit Court
LC Nos. 08-004022-FH
08-004197-FH
08-004620-FH

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

In three separate cases below, defendant pleaded guilty to one count of larceny in a building, MCL 750.360, one count of receiving or concealing stolen property worth at least \$1,000 but less than \$20,000, MCL 750.535(3)(a), one count of larceny from a motor vehicle, MCL 750.356a(1), two counts of breaking and entering a motor vehicle for the purpose of taking property worth less than \$200, MCL 750.356a(2)(a), and one count of absconding on bond, MCL 750.199a. The trial court imposed sentences of 17 months' to four years' imprisonment for the larceny in a building conviction, two to five years' imprisonment for the receiving or concealing conviction, 23 months' to five years' imprisonment for the larceny from a vehicle conviction, 93 days' incarceration for each breaking and entering conviction, and 23 months' to four years' imprisonment for the absconding conviction. The court additionally ordered defendant to pay restitution, costs, fees, and a fine, and it ordered that a penalty of 20 percent be added to amounts not paid within 56 days. See MCL 600.4803(1). Defendant appeals by leave granted, challenging the 20-percent interest provision of her sentences. We affirm because we find that defendant's issue is not yet ripe for appellate adjudication.

MCL 600.4803(1) provides:

A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and

owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty.

MCL 780.766(2) directs a sentencing court to “order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction” MCL 769.1k(1)(b) authorizes a trial court to include as part of a criminal sentence the imposition of fines, costs, the expenses of providing court-appointed legal assistance, or any other assessment authorized by law.

Defendant argues that the penalty provision of MCL 600.4803(1) violates constitutional principles of due process and equal protection because it increases criminal punishment for indigent defendants for no reason other than their indigency. Defendant further notes that the penalty comes into full force after 56 days elapse, and that, especially in cases of restitution, the penalty is not paid to the party that was entitled to the payment in the first place.

Because defendant frames her constitutional challenge in terms of disparate impact on the indigent, objections are addressed, if not entirely eliminated, when a court conscientiously takes the defendant’s ability to pay into account while enforcing the challenged penalty.

However, “[t]he plain language of MCL 769.1k does not require the trial court to consider a defendant’s ability to pay before imposing discretionary costs and fees” *People v Wallace*, 284 Mich App 467, 470; 772 NW2d 820 (2009). Further, “there is a substantive difference between the imposition of a fee and the enforcement of that fee.” *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009). In particular, “when a defendant is statutorily entitled to an ability-to-pay assessment, that assessment is not required when the fee or cost is imposed; instead, that assessment is only required at the time payment is required, i.e., when the imposition is enforced.” *Id.* at 291; see also *People v Music*, 428 Mich 356, 360; 409 NW2d 795 (1987).

In this case, when defendant argued for waiver of any 20-percent penalties, the trial court responded as follows:

I think statutes are presumed to be valid. I think the statute does allow the courts to—if they wish, to go ahead and either vacate or waive the late fee, which I may very—I’m not going to do it today. I may do that down the road when we go to collect it, but I don’t want to waive everything at this point. I may waive a portion while she’s incarcerated in prison, but I’m certainly not going to waive it in perpetuity. So I don’t want to get into that waiver issue today. . . . [I]n my mind it’s kind of premature. I think it would be once she gets out we can talk about a waiver, and maybe want to set up a payment plan or something. I’d be more than happy to probably waive the . . . penalty during the time of incarceration as well as maybe two months or so after she get out and then have it start or something like that. . . . But I’m going to deny at this point. . . . But the

Court will take a look at waiving that. I just don't want to do it now. But I would take a look at that when we're talking about trying to get it paid in the future, upon her release from incarceration. I think it would be appropriate.

The court emphatically indicated that it would consider defendant's ability to pay when, in the course of future events, payment was demanded.

Accordingly, assuming, without deciding, that to avoid a constitutional problem a trial court must consider a defendant's ability to pay before enforcing the 20-percent penalty provision of MCL 600.4803(1) for late satisfaction of financial burdens included within a criminal sentence, such an inquiry is not yet required in this case, because the trial court has expressly indicated on the record that it will consider waiving that penalty, in whole or in part, depending upon defendant's circumstances when payment of that penalty is demanded. Because the question of defendant's ability to pay was premature at sentencing, defendant's appellate challenge based on her ability to pay, in the absence of any indication that payment has yet been demanded, is also premature. We thus decline to reach defendant's argument. See *Stewart v Algonac Savings Bank*, 263 Mich 272, 284; 248 NW 619 (1933); see also *Rinaldi v Civil Service Comm*, 69 Mich App 58, 69; 244 NW2d 609 (1976) (“[w]e will not undertake a constitutional analysis when we can avoid it”).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder